OSK Trustees Bhd (as trustees for Sunway Real Estate Investment Trust) & Anor v Metroplex Holdings Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-(NCVC)(W)-2284–11 OF 2017
HAMID SULTAN, MARY LIM, YEOH WEE SIAM SCJJ
22 JANUARY 2019

Tort — Conversion — Damages — Respondent commenced proceedings for damages alleging appellants were liable for tort of conversion of goods that it had left behind — Whether respondent had possession of goods — Whether respondent had locus standi — Whether there was conversion — Whether there was abandonment by respondent

The respondent was the registered proprietor of commercial properties known as Putra Place and The Legend Resort ('the hotels'). It was also in the business of owning and operating a hospitality training business/centre ('the leisure business'). Under a leisure and office management agreement entered into between the respondent and a company known as Legend Management Group Sdn Bhd ('LMG'), the entire management, administration, marketing and operation of the hotels and the leisure business was contracted to LMG for a term of eight years ('management agreement'). Amongst the properties and businesses located at Putra Place was a shopping complex then known as 'The Mall' and a hotel also then known as 'The Legend Hotel'. Putra Place was subsequently auctioned and the first appellant purchased Putra Place as trustee of Sunway Real Estate Investment Trust. The second appellant was the manager of the trust. After payment of the full purchase price, Putra Place was registered in the name of the first appellant. The appellants issued notices requiring the occupants of Putra Place to vacate the premises within seven days. The respondent refused to yield possession, control and management of Putra Place to the appellants, demanding instead that an order of possession be first procured from the court. Meanwhile, The Legend Hotel continued to operate at Putra Place, operated and managed by LMG. The appellants obtained an order of possession from the High Court and an order for assessment of damages for the period of holding over of possession. The respondent then handed over possession of Putra Place. Almost four years after the formal handing over of possession, the respondent commenced proceedings for damages alleging that the appellants were liable for the tort of conversion of goods that it had left behind at The Legend Hotel. The learned judge found the respondent's claim was proven and hence this appeal.

Held, allowing the appeal with costs and setting aside the decision of the High Court:

(1) It was imperative that the precise identity of the goods, its nature and description including the amount or precise numbers must be particularly pleaded and established with certainty and clarity as part of the respondent's burden of proof. This was because the tort of conversion was one of strict liability and it required firm and positive proof of what precisely were the respondent's goods that were alleged to have been converted by the appellants. It was not enough to cite or plead the goods over which ownership was claimed and conversion alleged, by reference to some general or generic term. Such description and claim was grossly insufficient for a claim in conversion. The respondent was in the position to obtain an inventory of the goods, the particular details and specifics of the goods, over which ownership was asserted and conversion was alleged. Although the respondent alleged that the appellants had engaged security personnel over Putra Place that could not and should not had stopped the respondent from identifying its goods with specific alacrity (see paras 62 & 64–65).

(2) In any event, the terms of the management agreement refuted the respondent's claim. The operation of The Legend had been entirely contracted out to LMG. The respondent merely owned Putra Place on which amongst others, The Legend was located. Therefore, any ownership of any goods by the respondent was necessarily pursuant to the terms and conditions in the management agreement, and not as claimed by the respondent (see para 66).

(3) The person in whom the goods were in actual possession or had immediate right to possession was LMG, and not at all, the respondent. Since LMG was still operating and managing The Legend at the material time of the alleged conversion, if at all there was conversion, it would be LMG that had the right to sue, and not the respondent. The management agreement provided that upon termination of the agreement, LMG was to 'deliver and return' to the respondent all the goods in the hotel 'within 180 days'. The respondent's right of immediate possession only arose 180 days after the termination of the management agreement. Thus, at the time of possession by the appellants, the respondent was not entitled and did not have the locus standi to bring an action against the appellants for the tort of conversion (see paras 70–71, 73 & 76).

(4) The respondent did not seek out those goods till some three odd years later. This period was substantial and the respondent's explanation did not amount to credible or satisfactory account. Not only there was abandonment by conduct of the respondent and/or its representatives, but also there was evidence that the goods were to be intentionally and consciously left behind. The long lapse of over four years before the respondent commenced action for conversion served only to fortify that

conclusion that there had been abandonment of the goods claimed by the respondent, as well as gave rise to contentions of estoppel (see paras 87 & 92–93).

[Bahasa Malaysia summary

Responden adalah pemilik berdaftar hartanah komersial yang dikenali sebagai Putra Place dan The Legend Resort ('hotel-hotel'). Ia juga dalam perniagaan memiliki dan mengendalikan perniagaan/pusat latihan hospitaliti ('perniagaan kelapangan'). Di bawah perjanjian pengurusan kelapangan dan pejabat yang dimeterai antara responden dan syarikat yang dikenali sebagai Legend Management Group Sdn Bhd ('LMG'), keseluruhan pengurusan, pentadbiran, pemasaran dan operasi hotel-hotel dan perniagaan kelapangan dikontrak kepada LMG untuk jangka masa lapan tahun ('perjanjian pengurusan'). Antara hartanah dan perniagaan yang terletak di Putra Place adalah sebuah kompleks membeli-belah yang ketika itu dikenali sebagai 'The Mall' dan sebuah hotel yang juga ketika itu dikenali sebagai 'The Legend Hotel'. Putra Place kemudiannya dilelong dan perayu pertama membeli Putra Place sebagai pemegang amanah Sunway Real Estate Investment Trust. Perayu kedua adalah pengurus amanah tersebut. Selepas pembayaran penuh harga pembelian, Putra Place didaftarkan atas nama perayu pertama. Perayu mengeluarkan notis yang menghendaki penghuni Putra Place mengosongkan premis dalam masa tujuh hari. Responden enggan menyerahkan milikan, kawalan dan pengurusan Putra Place kepada perayu, malah menuntut agar perintah milikan terlebih dahulu diperoleh daripada mahkamah. Sementara itu, Legend Hotel terus beroperasi di Putra Place, dikendalikan dan diuruskan oleh LMG. Perayu memperoleh perintah milikan daripada Mahkamah Tinggi dan perintah pentaksiran ganti rugi untuk tempoh penahanan milikan. Responden kemudian menyerahkan milikan Putra Place. Hampir empat tahun setelah penyerahan milikan secara rasmi, responden memulakan prosiding tuntutan ganti rugi dengan mendakwa bahawa perayu bertanggungjawab atas tort konversi barangan yang ditinggalkan di Legend Hotel. Hakim yang bijaksana mendapati tuntutan responden terbukti dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan keputusan Mahkamah Tinggi:

(1) Adalah penting bahawa identiti barang yang tepat, sifat dan keterangannya termasuk jumlah atau nombor yang tepat harus diplidkan dan dibuktikan dengan pasti dan jelas sebagai sebahagian dari beban bukti responden. Ini adalah kerana tort konversi bersifat liabiliti ketat dan memerlukan bukti kukuh dan positif mengenai barang-barang responden yang didakwa telah dikonversi oleh perayu. Tidak mencukupi untuk menyatakan atau memplid barang-barang yang dituntut milikan dan konversi, dengan merujuk kepada istilah umum atau generik.

A Gambaran dan tuntutan sedemikian amat tidak mencukupi untuk tuntutan konversi. Responden berada dalam posisi untuk mendapatkan inventori barangan, terutamanya perincian dan pengkhususan barang, di mana milikan ditegaskan dan konversi didakwa. Walaupun responden mendakwa bahawa perayu telah melantik anggota keselamatan di Putra
B Place ia tidak dapat dan tidak boleh menghentikan responden daripada mengenal pasti barangan secara khusus (lihat perenggan 62 & 64–65).

(2) Walau apa pun, terma perjanjian pengurusan menyangkal tuntutan responden. Operasi The Legend telah dikontrak sepenuhnya kepada
C LMG. Responden hanya memiliki Putra Place di mana antara lain, The Legend berada. Oleh itu, setiap milikan barangan oleh responden semestinya berikutan dengan terma dan syarat dalam perjanjian pengurusan, dan tidak seperti yang dituntut oleh responden (lihat perenggan 66).

D (3) Orang di mana barangan itu dimiliki atau mempunyai hak untuk dimiliki adalah LMG, dan tidak sama sekali, responden. Oleh kerana LMG masih beroperasi dan menguruskan The Legend pada waktu material kononnya konversi, jika sama sekali terdapat konversi, LMG
E akan berhak menuntut, dan bukan responden. Perjanjian pengurusan memperuntukkan bahawa setelah penamatan perjanjian, LMG akan 'menghantar dan mengembalikan' kepada responden semua barangan di hotel 'dalam masa 180 hari'. Hak milikan responden hanya berbangkit 180 hari selepas penamatan perjanjian pengurusan. Oleh itu, pada waktu
F pemilikan oleh perayu, responden tidak berhak dan tidak memiliki locus standi untuk membawa tindakan terhadap perayu atas tort konversi (lihat perenggan 70–71, 73 & 76).

(4) Responden tidak memohon barangan tersebut sehingga tiga tahun kemudian. Tempoh ini cukup panjang dan penjelasan responden tidak
G berjumlah keterangan yang boleh dipercayai atau memuaskan. Bukan sahaja terdapat pengabaian dengan tingkah laku responden dan/atau wakilnya, tetapi juga terdapat keterangan bahawa barang tersebut ditinggalkan dengan sengaja dan sedar. Selang waktu lebih dari empat tahun sebelum responden memulakan tindakan konversi hanya untuk
H memperkuat kesimpulan bahawa terdapat pengabaian barangan yang dituntut oleh responden, dan juga menimbulkan pertikaian estoppel (lihat perenggan 87 & 92–93).]

Cases referred to

I *Abington v Lipscomb* (1841) 1 QB 776 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Bristol and West of England Bank v Midland Railway Company [1891] 2 QB 653, CA (refd)

Bunnings Group Ltd v CHEP Australia Ltd [2011] NSWCA 342, SC (refd)
Daniel s/o D Williams v Luhat Wan & Ors [1990] 2 MLJ 48, HC (refd)
Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal [2010] 3 MLJ 509, CA (refd)
Fowler and others v Hollins and others (1872) LR 7 QB 616 (refd)
Hollins and others v Fowler and others (1875) LR 7 HL 757, HL (refd)
Hoyt v Grand Lake Development Corp 13 NBR (2d) 544 (refd)
Hoyt v Grand Lake Development Corporation 79 DLR (3d) 241, SC (refd)
Marfani & Co Ltd v Midland Bank Ltd [1968] 1 WLR 956, CA (refd)
Margarine Union GmbH v Cambay Prince Steamship Co Ltd [1969] 1 QB 219, QBD (refd)
Rimba Muda Timber Trading v Lim Kuoh Wee [2006] 4 MLJ 505, FC (refd)
Robot Arenas Ltd and another v Waterfield and another [2010] All ER (D) 67 (Feb), QBD (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd [2009] 4 SLR 1101, CA (refd)
The 'Cherry' and others [2003] 1 SLR 471, CA (folld)
The Future Express [1993] 2 Lloyd's Rep 542, CA (refd)

Legislation referred to

Torts (Interference with Goods) Act 1977 [UK]

Appeal from: Civil No 22NCVC-523–09 of 2015 (High Court, Kuala Lumpur)

Lambert Rasa-Ratnam (Sree Harry, Sean Yeow and Aric Wong with him) (Lee Hishammuddin Allen & Gledhill) for the appellants.
M David Morais (Fiona Bodipalar, Raul Lee Bhaskaran and Khor Heng Hvow with him) (Bodipalar Ponnudurai De Silva) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The respondent successfully sued the appellants for damages arising from the tort of conversion. As the proceedings are bifurcated on agreement of the parties, the learned judge ordered damages to be assessed after finding the appellants liable. That exercise is presently awaiting the disposal of this appeal.

MATERIAL FACTS

[2] The respondent was the registered proprietor of commercial properties known as Putra Place and The Legend Resort ('the hotels'). It was also in the business of owning and operating a hospitality training business/centre ('the Leisure Business'). Under a leisure and office management agreement dated

A 1 October 2010 entered into between the respondent and a company known as Legend Management Group Sdn Bhd ('LMG'), the entire management, administration, marketing and operation of the hotels and the Leisure Business was contracted to LMG for a term of eight years ('management agreement') subject to various terms and conditions.

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[3] Amongst the properties and businesses located at Putra Place was a shopping complex then known as 'the Mall' and a hotel also then known as 'The Legend Hotel'. The Legend Hotel comprised 631 rooms, service apartments, four penthouses, and 1,323 parking bays.

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[4] The facts leading to an order for the sale of Putra Place are not relevant for the purpose of the present dispute save to say that such an order was granted by the High Court and Putra Place was subsequently auctioned. The first appellant was the successful bidder at the auction held on 30 March 2011. The first appellant purchased Putra Place as trustee of Sunway Real Estate Investment Trust. The second appellant is the manager of that trust. After payment of the full purchase price, Putra Place was registered in the name of the first appellant on 19 April 2011.

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[5] Disputes arose soon after, when the appellants wanted to take possession of Putra Place. The appellants issued notices requiring the occupants of Putra Place to vacate the premises within seven days. Security personnel were stationed at Putra Place. The respondent refused to yield possession, control and management of Putra Place to the appellants, demanding instead that an order of possession be first procured from the court. Meanwhile, the Legend Hotel continued to operate at Putra Place, operated and managed by LMG.

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[6] On 28 June 2011, the appellants obtained an order of possession from the High Court. Together with that order was an order for assessment of damages for the period of holding over of possession starting from 28 April 2011. This order was stayed pending the respondent's appeal to the Court of Appeal.

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[7] On 28 September 2011, the respondent handed over possession of Putra Place. Possession was done at a formal meeting between the lawyers representing the respective parties.

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[8] The respondent's appeal has since been dismissed. The assessment of damages for holding over was subsequently conducted and the respondent satisfied the order for damages on 19 April 2016. On 28 February 2018, the Federal Court dismissed the respondent's application for leave to appeal.

[9] On 28 September 2015, almost four years after the formal handing over of possession, the respondent commenced proceedings for damages alleging that the appellants were liable for the tort of conversion of goods that it had left behind at the Legend Hotel. The claim was initially also founded on the tort of detinue, trespass to goods and unjust enrichment. These claims were abandoned at the stage of submissions at the High Court.

[10] At the heart of the respondent's claim is the matter of the entire moveable chattels within the Legend Hotel comprising furniture, cutlery, bar equipment, tables, room linen, curtains, decorative items, air-conditioning and the like as pleaded at para 14 of the amended statement of claim (the goods). A full list of the goods is yet to be finalised with the respondent seeking an inventory to be produced by the appellants as part of the assessment of damages.

[11] The respondent claimed that the goods, not comprising some works of art, are in excess of the value of RM95m whilst the works of art are priced in the region of RM300m. It claimed that it had acquired and was at all times, the owner of the goods that were 'necessary, attendant and incidental to the operations of such a business'. Since it is common ground that the sale by auction was only for the land, building and permanent structures within the building, the respondent claimed that the chattels or moveable property belonging to the respondent that were on the premises, were not included in the sale, and the appellants were liable to account for the same.

[12] The claim was resisted with the appellants arguing, inter alia, that the respondent had no locus standi to sue on the tort of conversion; that the goods were handed over to the appellants without reservation, voluntarily and unconditionally, and that any demand for the goods was an afterthought; and that the respondent was estopped from asserting any rights or claim over the goods. The respondent's ownership is also disputed.

DECISION OF THE HIGH COURT

[13] The learned judge found the respondent's claim proved. Specifically, the learned judge was satisfied that the respondent was the owner of the goods in question, that it had left its goods at the Legend Hotel, and that the goods were at the Legend Hotel at the material time when the appellants took possession. Since the goods did not form part of Putra Place which was ordered to be sold by auction, the respondent remained the owner of those goods.

[14] The learned judge rejected the appellants' contention that the respondent had abandoned the goods or that it was the respondent's own employee, one Mandy Chew who had prevented the removal of the goods.

A Instead the learned judge agreed with the respondent that it was prevented from accessing and removing their goods by the security personnel stationed by the appellants. As for Mandy Chew's evidence, the learned judge found that she had objected to the removal only because she was under the mistaken impression that the appellants had a lien over the goods by reason of the order B for payment for damages due to the holding over. Since that payment had been resolved, there was no longer any issue of a lien.

[15] Finally, the learned judge rejected the appellants' contention that the C respondent had been guilty of delay and that the four years' delay in initiating the action amounted to estoppel against the respondent. According to the learned judge, the respondent had not been indolent as it was involved in various proceedings, contesting the vacant possession sought by the appellants.

D OUR ANALYSIS OF THE FACTS AND THE LAW

[16] Before us are two central arguments: the matter of whether there is conversion in law and on the facts, and the second concerns the matter of the defences of estoppel and abandonment. The appellants have approached the E first issue from the aspect of whether the respondent has the locus standi to sue for the tort of conversion. We are prepared to deal with it from that front before we consider the question of whether the tort of conversion exists or is proved, considering the relevant legal principles, before we finally deal with the matter of defences raised by the appellants.

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[17] The right of the respondent to bring the instant action was challenged at the High Court. Submissions were made by both parties. Unfortunately, this was not addressed by the learned judge. We are of the view that this is a relevant and material issue that must first be disposed before we can proceed to the G matter of the complaint of a commission of the tort itself, before considering the defences relied on.

[18] In order to properly address the issues in this appeal, it calls for a short incursion into the law on the tort of conversion. A brief and most enlightening H overview of the law on conversion and the related 'legal archaeology' was painstakingly undertaken by VK Rajah JA in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR 1101 at pp 1117–1120. A similar analysis may also be found in *Clerk & Lindsell on Torts* (21st Ed) (Chapter 17 — Wrongful interference with goods).

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[19] As explained in *Tat Seng Machine Movers*, 'the tort of conversion is a unique legal remedy with deep historical roots in common law of England. While it is usually classified as a tortious cause of action, in reality, it is an action 'primarily ... for the protection of ownership ...'. The writers *Clerk & Lindsell*

on Torts (21st Ed) similarly describe the tort of conversion as one of several torts the development of which 'stems from history. English law never developed a single wrong of wrongful interference with goods; instead it developed a congeries of different and often overlapping torts'.

[20] The development is piecemeal, starting with the right to sue for trespass and detinue. However, as per VK Rajah JA, both 'these remedies were not without their own practical difficulties. The remedy of trespass was not suited to all cases, for example, where the owner voluntarily put his goods into another's possession and the other refused to redeliver them ... While such a situation was covered by the remedy of detinue, there were likewise practical difficulties associated with the remedy of detinue in that a defendant sued in detinue could exercise the option of returning damaged goods or wage his law to the disadvantage of the plaintiff ... Given the serious gap in the law posed by the practical difficulties of trespass and detinue, the courts developed and adopted a new device of pleading known as conversion (as an action on the case) to fill this gap ...'.

[21] In the ensuing years, detinue fell into disuse with conversion or trover having taken over its role. VK Rajah JA opined that:

> Given the piecemeal case law development of the remedy of conversion, it is not surprising that the acts or circumstances which constitute, or do not constitute conversion have not been defined with hard-edged precision. It was this uncertainty associated with the tort that led Bramwell LJ to lament that he 'never did understand with precision what was conversion' (*Hiort v The London and North Western Railway Company* (1879) 4 Ex D 188 at 194 ... Complex rules continue to govern its application even today. For example, the action lies only if the claimant has possession or a right to immediate possession of the goods and this means that the owner who does not have such a right (say, because of the terms of the bailment) cannot bring an action for conversion. Generally, an act of conversion occurs when there is unauthorised dealing with the claimant's chattel so as to question or deny his title to it ... Sometimes, this is expressed in the terms of a person taking a chattel out of the possession of someone else with the intention of exercising a permanent temporary dominion over it (*RFV Heuston and R A Buckley, Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996).

[22] His Lordship reasoned that it was due to the 'exalted status that the common law accorded to property rights, the tort soon evolved into one of strict liability with the fault of the defendant becoming largely irrelevant in the legal analysis'. Lim Beng Choon J in *Daniel s/o D Williams v Luhat Wan & Ors* [1990] 2 MLJ 48, too, recognised that the duty to one's neighbour who is the owner or is entitled to possession of any goods is absolute and to usurp that proprietary or possessory right is to act 'in peril', citing Lord Diplock in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 at p 970 in support. Lim Beng Choon J explained that the 'gist of liability in conversion' may be

answered by reference to a passage of Cleasby B in his judgment in *Fowler and others v Hollins and others* (1872) LR 7 QB 616 at p 639:

> The action of trover is not founded upon contract or upon any particular relation of the parties, but upon property, and supposes the owner to have lost the goods, as the plaintiffs may in some sense be said to have done in this case, and the liability under it is founded upon what has been regarded as a salutary rule for the protection of property in chattels or exercise acts of ownership over them at their peril.

[23] With that backdrop in view, VK Rajah JA opined and cautioned:

> However, wise judicial minds in due course came to recognise that the rigorous and unthinking application of such a rule of strict liability could lead to injustice, and perhaps even constrict the growth and flow of commercial dealings; especially among those involved in the transportation and storage of goods industries. Such businesses routinely deal with goods belonging to other parties, often without having the practical means to ascertain and verify ownership of the goods received. Indeed, we can add, if the tort is not sensibly circumscribed in the context of present day commerce, it could end up raising business costs by necessitating increased insurance coverage and premiums and, perhaps, even stultifying trade flow. Given that trade is the life blood of any modern economy, the pressing need for the law to maintain a rational and harmonious equilibrium between the competing tensions of adequately protecting the sanctity of property rights and the pressing need to ensure the uninhibited flow of trade and commerce are obvious.

[24] In the UK, with the advent of the Torts (Interference with Goods) Act 1977 (c 32) (UK), all these torts are either abolished, subsumed or grouped together under the rubric of 'wrongful interference with goods'. The introduction of this Act was acknowledged in *Tat Seng Machine Movers* as 'sensible reform' which has yet to be adopted in Singapore. The same may be said of the position here but until then, the common law principles continue to apply. Care of course, must be exercised when considering the English position post the 1977 Act, although the principles have not materially changed under the statutory provisions.

[25] Taking heed of the observations as expounded by VK Rajah JA since the common law on the tort of conversion and interference with goods in Malaysia remains substantially the same as that in Singapore, we turn now to some of our own case law.

[26] While the cases may not define what constitutes and what does not constitute conversion with 'hard-edged precision' due to the piece-meal development of the law on this remedy, some governing principles may nevertheless be discerned. In *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509, the Court of Appeal cited *Osborn's Concise Law Dictionary* (7th Ed) to define 'conversion is 'a tort, committed by a person who

deals with chattels not belonging to him in a manner inconsistent with the rights of the owner'. A

[27] The Federal Court in *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505 at p 513 cited too with approval, the same observations on what would amount to conversion that were made by Lord Diplock in *Marfani & Co Ltd v Midland Bank Ltd* and quoted by Lim Beng Choon J in *Daniel s/o D Williams v Luhat Wan & Ors*, that it is conversion when one deals with goods belonging to someone else such as to usurp that someone of his proprietary or possessory rights in the goods, however mistakenly or innocent that dealing might have been. B C

[28] The essence of the tort of conversion consequently, is in the wrongful appropriation of another's chattels. Unlike the tort of trespass which concerns an interference with another's possessory interest in the chattel, the tort of conversion involves an injury to the other's right or title in the chattel whereby that other is deprived of the use and possession of the chattel. The right or title in the chattel is appropriated and appropriated wrongfully. D

[29] Further, it is conversion when there is a lack of mandate or authorisation before the goods of another are taken, detained, sold or dealt with in such manner as to usurp the rights, title, ownership or possession of the other. Conversion must be 'an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods' as per Lord Blackburn in *Hollins and others v Fowler and others* (1875) LR 7 HL 757 at pp 757 and 766, followed by Allsop P in *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342. It is not every intromission that amounts to conversion. So, if the appellants' act in relation to the goods would be justified or excusable in a person who knew he was not dealing with his own property, it is not conversion. E F G

[30] The tort may be committed in different ways. In *Director of Forests & Anor*, the Court of Appeal, citing *Winfield & Jolowicz on Tort* (15th Ed) p 588 explained that:

> What kind of right to the goods must the plaintiff have in order that interference with it may amount to conversion? The answer is that he can maintain the action if at any time of the defendant's act he had (1) ownership and possession of the goods; or (2) possession of them; or (3) an immediate right to possess them, but without either ownership or actual possession. This seems to be the law, but it can be elicited only from a great confusion of terminology in the reports. Thus is said in several cases that the plaintiff must have a 'right of property in the thing and a right of possession' and that unless both these rights concur the action will not lie. If 'right of property' means 'ownership', this might lead one to infer that no one can sue for conversion except an owner in possession at the date of the alleged conversion. But that is not so, for a bailee has only possession and not ownership (which remains in H I

A the bailor) and yet the bailee can sue a third party for conversion. And, as we shall see, one who has mere possession at the date of the conversion can generally sue, and so can one who has no more than a right to possess.

B **[31]** See also *Halsbury's Laws of Malaysia* on how the tort of conversion may be committed:

> Conversion exists in three forms. *The first consists of a positive wrongful act of dealing with the goods in a way which is inconsistent with the rights of the owner, and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them*. This inconsistency with the owner's rights provides the basis of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. The action is not one in which fraud is a necessary ingredient, although a conversion may involve a fraud. Goods may be the subject of successive and independent conversions by persons dealing with them in such a manner and with such an intention.
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> The *second form of conversion relates to the defendant wrongfully detaining the goods of the plaintiff*. The normal method of establishing a wrongful detention is to show that the plaintiff made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with that demand. In many cases this form of conversion will coincide the first.
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> The *third form of conversion is committed where goods are wrongfully disposed of* by the defendant. (Emphasis added.)

F **[32]** It must be appreciated that although the rules on how the tort of conversion exists are complex, those rules are clear and consistent in that the action lies only where it can be proved that the claimant has possession or a right to immediate possession of the goods in issue. As opined by *Clerk & Lindsell*, the tort of conversion and trespass 'suffer from a major gap because they lie only at the suit of a person with possession of goods, or (in the case of conversion) an immediate right to possess them. This means that in certain cases an owner out of possession (say because he has leased his goods to a third party or let them out on hire purchase) cannot recover them'.

H **[33]** In *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd*, the Court of Appeal similarly expressed this point in the following terms:

> It is only trite that *only a person who has actual possession or the immediate right to possess the goods concerned can sue for conversion* (see *The Cherry* [2003] 1 SLR 471 at (58)). However, having title to the goods concerned does not necessarily mean having the immediate right to possession (*The Cherry* at (64)).

[34] In its earlier decision of *The 'Cherry' and others* [2003] 1 SLR 471, the Court of Appeal of Singapore had allowed only the appeal and set aside the decision of the High Court that had found the appellants liable in conversion.

That was a hearing of three consolidated appeals, all of which were dismissed save for the appeal on the matter of liability for conversion in respect of cargo carried on board the vessel, *Hyperion*.

[35] The appellants there had argued, inter alia, that the trial judge was wrong in finding them liable in conversion because the respondents were not holders or indorsees of the bill of lading issued by the owners of the vessel, *Hyperion* for that relevant cargo. The appellants 'had relied on the well-established legal principle that a person has the right to sue for conversion if and only if he had, at the time of the conversion, either actual possession of, or the immediate right to possess, the goods converted. Being the owners of the goods allegedly converted is not always sufficient to entitle that person to immediate possession … In the court below, the judge accepted this principle but went on to hold that the rule was not inflexible and that the right to sue in conversion may be transferred to the plaintiff from a preceding holder of that right. In coming to this conclusion, the judge relied on *Bristol and West of England Bank v Midland Railway Company* [1891] 2 QB 653'.

[36] In *Bristol and West of England Bank v Midland Railway Company* [1891] 2 QB 653, cargo shipped under a bill of lading was subsequently transferred into the custody of the defendant, Midland Railway. The shipping documents were first held by two other banks before landing itself with the plaintiff bank. But before the plaintiff bank received the documents, the defendant had already delivered the goods to a man named Clark who was acting dishonestly. The defendant then could not make delivery to the plaintiff when it presented the bill. Bristol bank successfully sued the defendant for conversion despite the fact that the 'mis-delivery of the goods' had already taken place before the plaintiff was the holder of the bill of lading.

[37] The High Court in *The 'Cherry' and others* had reasoned that the claim in *Bristol and West of England Bank* was allowed on the basis of the plaintiff bank's 'title to the goods and not to its immediate rights of possession but that that was not an immediate and material difference as the issue was that of the right to sue and the reasoning would be the same whether it was a right to sue by having title in the goods or having the immediate right of possession'.

[38] The Court of Appeal disagreed, being of the view that 'Conversion as a cause of action can only be invoked by the person having the immediate right to possession'. The Court of Appeal further found that the decision in *Bristol and West of England Bank* had actually not been followed, with other authorities such as *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219 and *The Future Express* [1993] 2 Lloyd's Rep 542 rationalising that the claim was allowed because the act of conversion sued on was the inability of the defendant to produce the goods when the plaintiff bank presented the bill and

demanded delivery; and not by reason of an antecedent right vested with the two earlier banks at the time the goods were delivered to Clark.

[39] According to the Court of Appeal:

> 62. On the proper interpretation of the case therefore it is clear that Bristol Bank did not obliterate the requirement that *a plaintiff suing in conversion had to have had the immediate right to possession at the time of the alleged conversion in order to maintain such an action*. Moreover, the case did not allow the right of possession to be transferred retrospectively to the date when the act of conversion occurred. In the present case therefore, in order to succeed in conversion, the respondents had to show that on 7 December 1997 they had the immediate right to possession of the Hyperion cargo.
>
> 63. The evidence showed that, as of that date, the respondents did not hold the bill of lading issued by the owners of the Hyperion ...
>
> 64. *Having title to the goods, however, does not mean having the immediate right to possession*. When the goods are shipped on board a vessel and a bill of lading is issued in respect of the carriage, it is the carriers presumed intention and legal obligation to deliver to the holder of the bill of lading ... (Emphasis added.)

[40] We agree with that established legal proposition and we see no reason why it should not apply here with equal force. This legal principle comes from the fact that the liability for the tort of conversion is strict with overarching considerations of protecting property, due to its historical development. In such conditions, a defendant sued should only be confronted with disproving the plaintiff's claim of actual possession or immediate right to possession, as the defendant's intention or error, or even fraud, is generally irrelevant to the consideration of liability. The burden lies with the plaintiff who must meet these requirements. If an owner of the goods cannot make prove these fundamental elements, the claim in conversion cannot lie. There may be some other wrong or right that has been disabused, but it is not in the tort of conversion, and a claim founded on this tort must be dismissed.

[41] Yet another glaring factor that seems to have been overlooked, understandably because it is hardly ever an issue, is this — conversion can only exists in relation to specific property — see *Abington v Lipscomb* (1841) 1 QB 776. We would understand this to mean clear and identifiable property, that is, chattels of moveable property. Thus, where a demand is made for the return of the goods, the demand must be clear and unequivocal, and it cannot be for an unspecified part of a larger collection.

[42] This point becomes clearer when we examine the kind of remedies that may be sought and ordered where the tort is proved. The court may order for a delivery of the goods and for the payment of any consequential damages — order for specific delivery; an order for the delivery of the goods but giving the

defendant the alternative of paying damages by reference to the value of the goods together in either case with payment of any consequential damages — order for delivery or damages at defendant's option; or *damages simpliciter*. The final judgment is actually for payment of the value of the goods which have to be properly measured and assessed. Pending disposal of the main trial, interlocutory orders of delivery up may also be sought. By this order, the court orders for delivery up or safe custody of any goods which are or may become the subject matter of subsequent proceedings for wrongful interference or which any question may arise in such proceedings. Such an order preserves the goods in more ways than one.

[43] The burden always is on the plaintiff to prove that it is his chattel which has been converted; that the chattels or goods which form the subject matter of the tort are the plaintiff's; and not the other way round. It is also the plaintiff's burden to prove that he has the necessary right to sue for the tort of conversion and seek the particular remedies set out in the statement of claim.

[44] The time of assessment of value is also important. At common law, a distinction is drawn between conversion and detinue; in the latter, the value of the goods is assessed at the date of the judgment when the return of the goods would have been ordered and not at the earlier time of refusal to return them. In conversion, the time of conversion is normally the proper time for assessment of the value of the goods.

[45] With these guiding principles, we turn now to the decision of the learned judge.

[46] Before us, the respondent sought to make the same arguments that were successfully raised before the High Court. The respondent's claim is that all its goods as identified at para 14 of the amended statement of claim have been converted by the appellants. This is how it explains its relationship to those goods.

[47] Under the management agreement, the respondent had the responsibility of bearing 'all costs of operating and provision of facilities and services in the hotels and the Leisure Business shall be charged to the current Operating Costs and shall be borne by the Company' — see section 4.7.2. The term 'facilities and services' is however, undefined but several others are. And, it may be gathered from the terms of section 4.7 of the management agreement read together with section 4.2.3 that it refers to such facilities and services that would 'ensure that the hotels and the Leisure Business are operated in a manner which is customary and usual for similar business taking into account the local character in so far as is feasible and in the Manager's opinion advisable'.

[48] Under section 4.7.1, LMG had the responsibility of securing and entering into contracts concerning, inter alia, the maintenance and renewal of improvements, furniture, fixtures, fittings and furnishing, operating equipment and the plant, all in the name of the respondent; but the costs for the same are borne by the respondent — see section 4.7.2:

> 4.7.1 The Manager shall assist and, in the name of and on behalf of the Company, secure and enter into such contracts for the furnishing and or provision of utilities and maintenance, cleaning, security and other services to the hotels as the Manager shall deem necessary with contractors and such other specialist or other firms, for the proper, effective and efficient operation and maintenance thereof, including but not limited to the maintenance of the hotels and all parts thereof, the maintenance and renewal of Improvements, Furniture, Fixtures, Fittings and furnishing, Operating Equipment and the Plant.
>
> 4.7.2 All costs of operating and provision of facilities and services in the hotels and the Leisure Business shall be charged to the current Operating Costs and shall be borne by the Company.

[49] The terms 'Furniture, Fixtures, Fittings and Furnishings', 'Operating Equipment', and 'Operating Supplies' are defined in section 2.1 of the management agreement as follows:

> 'Furniture, Fixtures, Fittings and Furnishings' — all furniture, fixtures, fittings and furnishings, equipment, apparatus and other property whatsoever used in, or held in storage for use in or required in connection with the operation of the Hotels and the Leisure Business, including but not limited to those for guest room modules, offices, public areas, staff facilities, function rooms, kitchens, bars, laundries and dry cleaning facilities, office equipment including computers, material building equipment, cleaning and engineering equipment, and vehicles BUT EXCLUDING Operating Equipment, Operating Supplies and fixtures attached to and forming part of the Improvements.
>
> 'Operating Equipment' — the supply items and equipment utilised and or required for the operation of the Hotels and the Leisure Business, including but not limited to:
>
> (1) all chinaware, glassware, cutlery, silverware and the like;
>
> (2) all linen, bedding and uniforms;
>
> (3) all cleaning and engineering equipment, tools, utensils and similar items;
>
> (4) all telecommunications, electric and electronic equipment;
>
> (5) all specialised hotel equipment including those required for the operation of kitchens, laundries, dry cleaning facilities, bars and restaurants; and
>
> (6) all accounting, management and sales systems;
>
> used in, or held in storage for use in, or required in connection with the operation of the Hotels and the Leisure Business.

'Operating Supplies' — all inventories of merchandise held for sale, and consumable items used in, or held in storage for use in, or required in connection with the operation of the Hotels and the Leisure Business, including food, beverages, soap, shampoo and other toiletries, cleaning materials, stationery, matches, cooking fuel and other similar items.

[50] At para 14, the respondent pleaded that:

14. In the course of operating such business, the plaintiff acquired and was at all times the owner of various chattels and moveable items necessary, attendant and incidental to the operations of such business and includes ('the Goods').

(a) furniture and office equipment such as tables, chairs, sofas, Photostat machines, telephones, printers, faxes, shredders, cabinets, safes and the like;

(b) decorations including decorative lighting such as chandeliers, carpets, portraits, paintings, pictures and the like;

(c) cutlery such as plates, saucers, glasses, cups, spoons, knives forks, buffet equipment, ladles and the like;

(d) kitchen equipment for the purposes of preparing individual meals and drinks on a constant and large scale including buffets such as stoves, microwave ovens and other ovens, refrigerators, grills, pots and pans, knives, clothings for kitchen staff, ventilators, exhaust and the like;

(e) bar equipment for preparing or serving hard and soft drinks including blenders, coffee-machines, drink dispensers, ice-boxes and the like;

(f) concierge and reception tables, dining tables and chairs, sofas, buffet tables, table and chair covers and the like;

(g) blinds, curtains, bedding, cupboards, safes in respect of the individual rooms;

(h) split and centralised air-conditioned units and their attendant supporting equipment;

(i) various other items and chattels which are too specific or numerous to be listed herein.

[51] At paras 15–17, the respondent asserted that on 27 September 2011, the goods remained on Putra Place; that at the time the appellants took possession, the lawful and beneficial ownership of the goods remained with the respondent and that property in the goods never passed to the appellants. The respondent claimed that when the appellants took possession of Putra Place, its representatives were only allowed limited access, that is, only to the corporate office of the respondent on the 33rd floor, that it was refused access to the other floors including the accounts department, or reasonable time and opportunity to take the goods away. It was the respondent's claim that since the appellants bought just Putra Place at the auction without the business, the appellants were

thus liable for conversion, detinue and trespass of the goods; and unjust enrichment. As pointed out, the latter causes of action were abandoned, only the claim in conversion was maintained.

[52] It would appear that the respondent's claim is by virtue of its ownership *ipso jure*, that by reason of its relationship with LMG and the terms of the management agreement and what the appellants bought in the auction sale, it had fulfilled the requirements for bringing the claim in conversion. While we appreciate the circumstances that have brought about the state the respondent now finds itself in, needless to say that though fraught with difficulties, the legal requirements for an actionable tort of conversion must nevertheless be met before the claim allowed by the learned judge is upheld.

[53] To these claims and assertions are the following responses of the appellants. First, the matter of the 'goods' themselves which form the subject matter of the claim. While the 'goods' pleaded at para 14 of the amended statement of claim may broadly and arguably fall within the definitions as found in the management agreement, as any acquisition of the goods by the Manager, LMG, would be in the respondent's name and on its behalf, whether the 'goods' claimed by the respondent were actually in The Legend or Putra Place at the material time when the appellants took possession is actually under serious challenge.

[54] This is evident from paras 9–11 of the amended defence where the appellants had, inter alia, put the respondent to strict proof as the respondent had not particularised and/or confirmed any particulars of ownership of the goods save as to make general descriptions at para 14 of the amended statement of claim.

[55] The added difficulty is the identification of the chattels themselves which form, if at all, the 'goods' over which the claim for conversion is founded. Even the respondent themselves acknowledge this difficulty at para 31 when it pleaded:

> 31. Full particulars of the Goods and their value thereof are within the full knowledge of the defendants and the plaintiff is unable to provide the same until discovery.

[56] From the time of the auction to the actual possession of Putra Place was a lapse of some six months, and the auction was successfully concluded on 30 March 2011, whereas possession of Putra Place was only resolved and handed over to the appellants on 27 September 2011. The appellants claimed that such handing over was without any reservation and, upon taking possession, it carried out extensive renovations and refurbished Putra Place for

the operation of its business which is now known as 'Sunway Putra' comprising an office tower, mall and a hotel — see para 10. A

[57] The appellants further claimed that the respondent did not make any arrangements to remove its purported goods from Putra Place, especially from the time of sale to the time of delivery of possession. The appellants claimed that it was consequently entitled to deal with the goods since the respondent was no longer interested in them and had abandoned the goods. B

[58] So, how do the principles fit in given these pleas and responses and circumstances? C

[59] The learned judge found the respondent's claim proved, accepting that the respondent had goods that it owned (*pemilik sebenar harta alih tersebut*) and which it left at The Legend 'sama ada untuk hiasan atau digunakan di dalam perniagaan hotel tersebut'. The learned judge also decided that there was evidence that the respondent stored and continued to store the antiques claimed by the respondent in a separate room, and that the appellants had removed a part of the goods to one of its branch hotels in Seberang Jaya in Penang, and that such removal was without the consent or permission of the respondent. D E

[60] In the learned judge's opinion, the appellants had committed the first and second forms of conversion as set out in *Halsbury's Laws of Malaysia*, and as discussed earlier, that is, the appellants had committed positive wrongful acts of dealing with goods which were inconsistent with the rights of the respondent owner, that it had the intention in so doing to deny the respondent owner's right or that the appellants had asserted a right inconsistent with the owner's rights, and when it refused to return the respondent's goods following the respondent's demand. F G

[61] These findings and conclusions were reached despite the learned judge finding that the evidence available was not able to clearly establish 'jenis-jenis harta alih-harta alih tersebut dari segi jenis dan kuantiti serta nilainya namun demikian terdapat keterangan yang kuat menunjukkan terdapat harta alih-harta alih tersebut' — see paras 16, 17 and 28 of the grounds. It was the learned judge's view that even though the actual amount or quantity and the value of the goods could not be determined at that point in time (*walau bagaimanapun jumlah sebenar dan nilai harta alih yang terlibat tidak dapat ditentukan di dalam prosiding sekarang*), this was not so material for the purposes of determining the appellants' liability (*tidak begitu material bagi memutuskan isu liabiliti defendan*). The learned judge felt that issue was only relevant when determining the quantum of damages given that the proceedings had been bifurcated. H I

[62] With respect, we disagree. It is imperative that the precise identity of the goods, its nature and description including the amount or precise numbers must be particularly pleaded and established with certainty and clarity as part of the respondent's burden of proof. This is because the tort of conversion is one of strict liability and it requires firm and positive proof of what precisely were the respondent's goods that are alleged to have been converted by the appellants.

[63] When a tort is considered as one where liability is strict, it means that the defendant may be found liable for injury or damage in respect of conduct which cannot be shown to be either intentional or negligent. To establish liability, the plaintiff is not required to prove that the event which caused him injury is either calculated by the defendant or resulted from the lack of care on his part. As explained by *Clerk & Lindsell on Torts* at para 1–68, 'the imposition of strict liability is rooted in the importance attached by the common law to the interest violated by the defendant'. There are criticisms for this (see for instance *Clerk & Lindsell on Torts* at para 1–68 to 1–72) but as we have pointed out earlier, in the case of the tort of conversion, this is due to the way the law on the protection of interests in chattels have developed.

[64] It is not enough to cite or plead the goods over which ownership is claimed and conversion alleged, by reference to some general or generic term such as 'furniture and office equipment', 'decorations', 'bar equipment', 'kitchen equipment', 'and the like', 'various other items and chattels which are too specific or numerous to be listed herein' as the respondent has done at para 14 of the amended statement of claim. In that para 14, the respondent claimed that the goods are those 'various chattels and moveable items necessary, attendant and incidental to the operations of such business' that it had acquired in the course of operating the business; the 'business' being that of operating the Mall, an Office Tower and The Legend Hotel & Service Apartments on Putra Place. We are of the view that such description and claim is grossly insufficient for a claim in conversion.

[65] From the time of the sale of Putra Place to the appellants on 30 March 2011 to the time when the appellants were finally given possession of Putra Place including The Legend, the respondent resisted vacating Putra Place, and insisted that an order of possession be first obtained. The proceedings related to that order took the next six months and when vacant possession was handed over, the court also ordered the respondent to pay damages for the period of the holding over of possession starting from 28 April 2011. This intervening period is significant because it shows that the respondent was in the position to obtain an inventory of the goods, the particular details and specifics of the goods, over which ownership is asserted and conversion is alleged. We understand that The Legend continued operations under LMG during this

whole intervening period. Although the respondent alleged that the appellants had engaged security personnel over Putra Place that, in our view, cannot and should not have stopped the respondent from identifying its goods with specific alacrity.

[66] In any event, the terms of the management agreement refute the respondent's claim. The agreement shows that the operation of The Legend had been entirely contracted out to LMG — see section 3.1.2. The respondent merely owns Putra Place on which amongst others, The Legend is located. This was in fact specifically found to be the case by the learned judge — see para 4 of the grounds of decision: 'Hotel Legend dimiliki oleh plaintif dan diuruskan oleh Legend Management Group Sdn Bhd'. Therefore, any ownership of any goods by the respondent is necessarily pursuant to the terms and conditions in the management agreement, and not as claimed by the respondent. This material fact was not considered by the learned judge and it is prejudicial to the evaluation of the claim.

[67] On this point alone, the respondent's claim ought to have been dismissed and the appeal before us, allowed.

[68] The appeal would also be allowed on the further ground that the respondent lacks the necessary locus standi to sue on the tort of conversion. The respondent claimed that, as owners of the goods and as the persons entitled to the immediate possession of the goods, it was the only party that could bring the action. According to the submissions of the respondent, LMG were merely in possession of the chattels for the purpose of managing the hotel. On termination of the management agreement, LMG's possession ceased and reverted to the respondent owners. The respondent relied on sections 3.1, 4.1, 10.7 and 13.4.1(ii)(d)(iii) of the management agreement. On termination, the return of the chattels was immediate, the 180-day stipulation was merely a time-frame for compliance by LMG. LMG's 'agency and possession ceased immediately on the handing over to the appellants and any possessory title that LMG might have had, also ceased at that point in time' as it was only appointed to manage the hotel on behalf of the respondent. The respondent claimed that LMG was only using the chattels to manage the hotel.

[69] On the first issue of whether there were any chattels and whether the respondent was the owner of such chattels, the learned judge answered that he was satisfied that the respondent had proved that it had left and displayed its chattels at the hotel prior to the appellants taking over possession of Putra Place; after accepting the evidence of the respondent's witnesses that the chattels were for display or use in the business of the hotel (untuk hiasan atau digunakan di dalam perniagaan hotel tersebut) — see para 16 of the grounds of decision.

[70] We disagree. This is the paradox of the tort of conversion, it is simple in its requirements but complex in its application. It cannot be pointed out enough that it is not ownership of the goods, assuming the goods claimed met the required threshold, which they do not, that confers the requisite *locus standi* to make the claim. It is having actual possession of the goods or having the immediate right to possession of the same. The evidence before the trial court was that the person in whom the goods were in actual possession or had immediate right to possession was LMG, and not at all, the respondent.

[71] As held in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd*, 'only a person who has actual possession or the immediate right to possess the goods concerned can sue for conversion'; that having title or ownership to the goods does not necessarily mean having the immediate right to possession. Since LMG was still operating and managing The Legend at the material time of the alleged conversion, if at all there was conversion, it would be LMG that had the right to sue, and not the respondent. Even the respondent's witness, PW5 confirmed in court that it was LMG that was not only managing and operating the hotel, LMG was in charge and in possession of the goods in The Legend at all material times.

[72] Whether LMG had possession of the goods as agent, manager, operator or even bailor, it was the person with the possession. It certainly was the person with the immediate right of possession. It is that holding that confers the locus standi to sue for conversion, and not ownership.

[73] This conclusion is further supported by section 13.4.1 of the management agreement which provided that upon termination of the agreement, LMG was to 'deliver and return' to the respondent all the goods in the hotel 'within 180 days'. As part of the management agreement, the goods were in the charge and possession of LMG. This was confirmed by the respondent's witness, PW5, and borne out by the terms of the management agreement.

[74] Section 13.4 provides for the LMG/manager's covenants upon termination of the management agreement. It reads:

> 13.4.1 On expiration of the Term or early termination of this Agreement, the Manager undertakes to and shall:
>
> (i) within one hundred and eighty (180) days cease carrying on the management and operation of the hotels and the Leisure Business and remove all its property from the hotels and the Leisure Business and use its best efforts to leave the hotels and the Leisure Business in a clean and orderly fashion and condition;

(ii) within one hundred and eighty (180) days turn over and return to the Company all original copies of documents relating to the Company and or the hotels and the Leisure Business which have come into the Manager's possession during the course of management of the hotels and the Leisure Business which have come into the Manager's possession during the course of management of the hotels and the Leisure Business in accordance with the provisions of this Agreement, including but not limited to:

(a) ...

(b) ...

(c) ...

(d) ...

(iii) within one hundred and eighty (180) days surrender and assign to the Company, any and all licences, permits, consents and other authorisations or property required for the operation of the hotels and the Leisure Business; and

(iv) within one hundred and eighty (180) days deliver and return to the Company any and all *Furniture, Fixtures, Fittings and Furnishing (together with warranties, operating instructions, manuals and service contracts), Operating Equipment, Operating Supplies, keys locks and safe combinations, reservation lists and all other things*.

13.4.2 Within one hundred and eighty (180) days after the expiration of the Term or earlier termination of this Agreement, the Manager shall furnish to the Company, the Closing Accounts which shall set out completely and accurately all transactions subsequent to those shown in the Accounts last submitted to the Company.

13.4.3 The Manager shall within one hundred and eighty (180) days of the expiration of the Term or early termination of this Agreement pay to the Company the Gross Operating Revenue relating to the period covered by the Closing Accounts.

13.4.4 The expiration of the Term or the early termination of this Agreement shall be without prejudice to any right, which may have been accrued to either of the parties hereto in respect of an antecedent breach or default of the other party. (Emphasis added.)

[75] Contrary to the respondent's assertion that this clause merely provides a time-frame for compliance, this clause not only shows that it was LMG who was in actual possession at the material time, otherwise it would not be required to deliver and return any goods to another; it was also the person who had the immediate right to possession. It had 180 days to deliver and return the goods. That obligation arises only upon termination of the management agreement. And, termination, if at all, would have taken place at the earliest, when the appellants were handed possession by the respondent.

A **[76]** Further, termination of the management agreement could not have happened on the date of the sale of Putra Place since LMG continued to operate The Legend until possession was handed over to the appellants on 27 September 2011. Even then, the respondent's right of immediate possession only arose 180 days after the termination of the management agreement. Thus, at the time of possession by the appellants, the respondent was not entitled and did not have the locus standi to bring an action against the appellants for the tort of conversion.

C **[77]** We had mentioned that termination of the management agreement, if at all there was termination, would have taken place at the earliest on 27 September 2011 because termination is not automatic nor unilateral under the terms of the management agreement. The arrangements between LMG and the respondent are purely contractual and how they may choose to terminate their relationship is entirely a matter of privity and for the parties to raise and rely on causes specified in the management agreement and any other intervening reasons. Frustration is one such reason, but it is still for the parties to rely on that cause, if they choose to. It is however, not open to the respondent to waive that reason at the appellants and claim some possessory right to any chattel that arose under that agreement.

[78] We understand that there were some submissions made by the respondent that it was the employment of the employees of LMG that was terminated on 27 September 2011. We agree with the submissions of the appellants that this termination is irrelevant to the central issue of who was in possession or had the right of immediate possession of the goods on 27 September 2011 or even 28 September 2011. If, at all, any of the employees had possession of any article or item of the goods, that in itself, will deprive the respondent of any locus standi to sue for conversion of that item.

[79] For completeness, we will also deal with the defences raised.

[80] We agree with the submissions of learned counsel for the appellants that even if the respondent had locus standi to sue in conversion, the claim would still fail on the ground of abandonment of the goods, and the impact and implication of the four year delay on the respondent's claim.

[81] Learned authors, *Palmer on Bailment* para 26–0121 explained the meaning of 'abandonment' in the following terms:

> The notion of abandonment may apply in two different senses to objects found by a non-owner: one colloquial and done juristic. In the first sense, a loser may abandon the search for a lost object, whether by reason of other claims on his time, or a belief that the place where the object has been lost is one where others are likely to find it and return it. The loser in that position does not resign any proprietary or

possessory claims to the chattel, and when the chattel is found the ordinary rules apply: the law recognises the paramount claim of the owner and, subject to that, normally awards the goods to the person first in possession.

The second and more important is that of a divesting abandonment, where the finder comes upon a chattel that the owner has previously left or cast away with the intention of divesting himself not only of possession but also of ownership.

[82] An example of the first type of abandonment would be the case of *Daniel s/o D Williams v Luhat Wan & Ors* while the present appeal falls within the second category. And, it is for the appellants to establish the existence of divesting abandonment for the claim in conversion to fail.

[83] On abandonment, the appellants' argument is thus, and this can be seen from para 12 of the amended defence. In essence, the appellants claimed that since the respondent had not made any arrangements to remove the purported goods from Putra Place, the appellants will deal with them accordingly since the respondent was no longer interested in them and have abandoned them. The respondent had every opportunity to remove the goods from the time Putra Place was sold to the time possession was delivered to the appellants.

[84] At the trial, the appellants also relied on the evidence of the respondent's witnesses, PW5 (LMG's crisis manager) and PW6 (LMG's Director of F&B and member of LMG's executive committee), both of whom confirmed that the goods were consciously and deliberately left behind on the instructions of one Mandy Chiew, the President of LMG given on 27 September 2011.

[85] The respondent claimed that Mandy's instructions were supposedly given on behalf of the second appellant and not LMG because she had joined the second appellant after leaving LMG. Mandy Chiew was never called. Also, that Mandy Chiew was under some mistaken impression that the appellants had a lien over the goods.

[86] The appellants clarified that the matter of the lien was conceded during oral arguments before the High Court as a 'red herring'. With that, we do not propose to say anything more on it. As for Mandy Chiew and who she was speaking or acting for at the material time, the evidence shows that she was still then with LMG, and still acting on behalf of LMG as manager and operator of The Legend. PW2, the solicitor for the respondent had further testified that Mandy Chiew had also attended the meeting between the parties on 28 September 2011 as one of the employees of LMG, to hand over possession of the hotel to the appellants. We agree with the appellants that she could not possibly have done that if she was already with the appellants.

[87] What the learned judge appears to have overlooked are the uncontroverted evidence in the form of instructions from Mandy Chiew to leave the goods behind. Not only that, the respondent did not seek out those goods till some three odd years later. This period is substantial and the respondent's explanation that it was attending to the legal proceedings in relation to the challenge on the sale, do not, in our minds, amount to credible or satisfactory account. Particularly, where and if the goods are of the value now claimed by the respondent. This long interval of inactivity is not consistent conduct of a claimant asserting that there has been an interference with and a conversion of his goods.

[88] We further agree with the appellants that there was ample evidence of abandonment. This is substantially similar to the facts in *Hoyt v Grand Lake Development Corp* 13 NBR (2d) 544, where a claim in conversion failed because the goods were deemed abandoned after having been left behind for 4 1/2 years. In that case, the plaintiff had ceased coal mining operations and had decided to leave his goods, coal mining equipment as listed in Schedule A of the statement of claim at a property where another operator was still carrying on coal mining operations. The plaintiff left the equipment there for over 4 1/2 years, without even going back to look at them until October of 1972, when it disappeared. The plaintiff had no idea where the equipment went. There was evidence of some salvage operations under the directions of the defendant.

[89] According to Barry J:

> ... undoubtedly in the course of operations that equipment must have gotten used or sold or sold as scrap, or put to some other use, but in my opinion, Mr Hoyt had abandoned it.' The learned judge was further of the view that 'by any preponderance, and if somebody leaves equipment that they claimed to be worth $75,000.00 for 4 1/2 years and doesn't even go back to look at it, I consider it to be abandoned, and I assume that that is what the defendant corporations may have thought as well. If this equipment had the value Mr Hoyt claims that it has, I don't understand why he didn't sell it. He chose to leave it there and continue to negotiate with representatives of the government, who already indicated, and continue to indicate, that they were not going to pay for it, and because it is gone now Mr Hoyt and his company are asking the Court to make the government pay for something which they didn't even want to buy, obviously, and wouldn't touch.

[90] The decision of Barry J was reversed on appeal on the basis that the finding of no conversion was against the weight of evidence of conversion. However, the Appeal Division went on to dismiss the appeal for lack of proof of damages. According to Ryan J, the proper measure of damage would be the value of the equipment at the time of the conversion; but because there was no evidence upon which it was possible to establish that value, the appeal should be dismissed.

[91] The Supreme Court dismissed the appeal, but for different reasons, and those reasons are relevant for our appeal. First, the Supreme Court reversed the Appeal Division's decision on the existence of conversion, finding that 'the learned trial judge was in my opinion amply justified in concluding that there was no evidence to satisfy him of conversion'. As for the matter of establishing the amount of damage, where the Appeal Division found it 'impossible to establish', the Supreme Court 'thought that the proper course under such circumstances would have been to remit the case to the trial judge to hear further evidence and to assess the damages'. However, in view of the reversal of the decision on the proof of conversion, '*no question of assessment of damages arises*' — see *Hoyt v Grand Lake Development Corporation* 79 DLR (3d) 241.

[92] We make the same observations on the peculiar facts in this appeal. Not only do we find abandonment by conduct of the respondent and/or its representatives, but also there is by clear indication from the evidence of PW5 and PW6 that the goods were to be intentionally and consciously left behind. In *Robot Arenas Ltd and another v Waterfield and another* [2010] All ER (D) 67 (Feb), citing *Palmer on Bailment* as to when chattels will be treated as having been abandoned for the purposes of conversion, and that is when those person who had possession or the immediate right to possession of the goods renounced that possession or right:

> Despite some surviving doubt, the better opinion appears to be that divesting abandonment is a defence to conversion provided that a party entitled to do so has renounced possession and the immediate right to possession of the chattels in question. Clear evidence both of intention to abandon and of some physical act of relinquishment will be required and, given the element of strict liability in conversion as contrasted with the need for mens rea in crime, it would seem that a mere reasonable belief that abandonment had taken place would not suffice as a defence ...

[93] The long lapse of over four years before the respondent commenced action for conversion serve only to fortify that conclusion that there has been abandonment of the goods claimed by the respondent, as well as give rise to contentions of estoppel as pronounced in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. We do not see the placement of security at Putra Place to make any or any material difference to these conclusions, especially when LMG continued to manage and operate The Legend till the time of handing over of possession to the appellants.

[94] On this added ground, the claim ought to have been dismissed.

A CONCLUSION

[95] On all fronts, we are in agreement with the appellants that the learned judge had plainly erred in his judicial appreciation of the law, had misapprehended the facts and had seriously misdirected himself, reaching conclusions that no reasonable court, similarly circumstanced, would have reached. Under such conditions, it can be safely said that no reasonable court which, having properly directed itself and asked the correct questions, would have arrived at that same conclusion. As such, we are under a duty to intervene — see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395.

[96] The appeal is, therefore, with merit, and the appeal is accordingly allowed with costs. The decision of the High Court is hereby set aside.

Appeal allowed with costs and decision of High Court set aside.

Reported by Ahmad Ismail Illman Mohd Razali